In the Supreme Court of the United States

OCTOBER TERM, 1951

LORETTA STARVUS STACK, AL RICHMOND, PHILIP MARSHALL CONNELLY, DOROTHY ROSENBLUM HEALEY, ERNEST OTTO FOX, WILLIAM SCHNEIDERMAN, CARL RUDE LAMBERT, HENRY STEINBERG, OLETA O'CONNOR YATES, ROSE CHERNIN KUSNITZ, MARY BERNADETTE DOYLE AND ALBERT JASON LIMA, PETITIONERS

v.

JAMES J. BOYLE, UNITED STATES MARSHAL, RESPONDENT

ON PETITION FOR BAIL PENDING APPLICATION FOR A WRIT OF CERTIORARI

BRIEF FOR THE RESPONDENT IN OPPOSITION AND SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals are not yet reported.

QUESTIONS PRESENTED

1. The District Court did not issue writs of habeas corpus on the petitions therefor, but issued

orders to show cause, and after a hearing thereon, it denied the petitions and discharged the orders to show cause, and its action was affirmed by the Court of Appeals. The question on this phase of the case is whether this Court or a Justice of the Court has power under Rule 45 of the Rules of the Court to grant bail pending review of the District Court's decision.

2. Whether habeas corpus will lie to challenge as excessive bail fixed on the return of an indictment, or whether the defendant's sole remedy is to apply to the district court for a reduction of bail.

3. Whether the courts below in this habeas corpus proceeding erred in concluding that the bail fixed on the indictment was not excessive.

RULES INVOLVED

Rule 45, Revised Rules of the Supreme Court of the United States:

> 1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.
>
> 2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case.
>
> 3. Pending review of a decision discharging a

prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceeding; and if in the opinion of the court or judge rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice.

4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard.

Rule 46, Federal Rules of Criminal Procedure:

(a) RIGHT TO BAIL.

(1) *Before Conviction.* A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.

* * * * *

(c) AMOUNT. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or

judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.

STATEMENT

Petitioners were arrested on July 26, 1951, under warrants issued by a United States Commissioner in the Southern District of California on complaints charging them with conspiracy to commit offenses prohibited by the Smith Act, 54 Stat. 670, 671, 18 U.S.C., Supp. IV, 371, 2385. Four of the petitioners were arrested in Los Angeles (Healey, Connelly, Kusnitz, Steinberg), seven in San Francisco (Lima, Yates, Lambert, Richmond, Fox, Stack, Doyle), and one in New York (Schneiderman). A United States Commissioner in Los Angeles fixed bail for those arrested there at $75,000 each pending preliminary examination. A United States Commissioner in San Francisco fixed bail for four of those arrested there at $75,000 each and for the other three at $7,500 (Yates), $2,500 (Doyle), and $2,500 (Stack). A United States Commissioner in New York fixed bail for Schneiderman at $100,000 pending removal proceedings. (Pet. 1-4.)

On July 27, 1951, Judge Louis E. Goodman, of the District Court for the Northern District of California, on a motion by the Government for an increase of the bail of Yates, Doyle and Stack and

motions by Lima, Lambert, Richmond and Fox for a reduction of bail, fixed bail for each of them at $50,000 pending their removal to the Southern District of California. The next day Judge Goodman denied their petitions for writs of habeas corpus. (Pet. 3-4.)

On July 31, 1951, a grand jury in the Southern District of California returned an indictment charging the applicants with conspiracy to commit offenses prohibited by the Smith Act, 54 Stat. 670, 671, 18 U.S.C., Supp. IV, 371, 2385. The grand jury recommended that bail be fixed at $75,000 for each of the applicants except Schneiderman and that his bail be fixed at $100,000. (Pet. 4-5.) Later that day Judge James M. Carter of the District Court for the Southern District of California, after denying an oral motion that he disqualify himself for personal bias and prejudice, fixed bail at $75,000 for each of the four petitioners arrested in Los Angeles (Pet. 4-5).

On August 1, 1951, the seven petitioners arrested in San Francisco were removed to Los Angeles (Pet. 5). On August 6, all of the petitioners except Schneiderman, who was still in New York, moved in the District Court for the Southern District of California to fix bail in, or reduce bail to, a reasonable amount. The motions came before Judge Carter, and petitioners filed an affidavit of personal bias and prejudice requesting Judge Carter to disqualify himself. On August 7 Judge Carter held

the affidavit legally insufficient and, upon request, withheld a ruling on petitioner Connelly's bail motion pending appellate review of the ruling that the affidavit of bias was insufficient. On August 8 Judge Carter fixed bail for the other petitioners at $50,000 each, except Yates and Stack, as to whom bail was fixed at $25,000. (Pet. 5-6.)

On August 7, 1951, Judge Edward J. Dimock, of the District Court for the Southern District of New York, reduced Schneiderman's bail to $50,000 (Pet. 4). On August 14, 1951, he was removed to Los Angeles, arriving on August 17 (Pet. 6).

On August 24, 1951, the Court of Appeals for the Ninth Circuit held that the above-mentioned affidavit of personal bias and prejudice was legally sufficient. *Connelly* v. *The United States District Court*, etc., No. 13,053. Accordingly, on August 29, 1951, Judge Carter disqualified himself. (Pet. 7-8.) [1]

After a hearing on motions by all the petitioners to fix or reduce bail, Judge Mathes on August 30 fixed bail for each of them at $50,000 (Pet. 8).

On September 12, 1951, Judge Harrison, of the District Court for the Southern District of Cali-

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[1] Meanwhile, on August 17, District Judge Mathes dismissed petitions for habeas corpus on behalf of all the petitioners except Connelly and Schneiderman in which it was claimed that the amounts of bail previously fixed by Judge Carter were excessive. On August 27, after the Court of Appeals' decision disqualifying Judge Carter, the petitioners in that habeas corpus proceeding dismissed their appeals from Judge Mathes' orders. (Pet. 6-8.)

fornia, after a hearing on an order to show cause, denied petitions for writs of habeas corpus in which petitioners claimed that their detention was illegal because the bail fixed was so excessive as to constitute a denial of bail (Pet. 8-9). Judge Harrison concluded that the bail fixed was neither "arbitrary or the result of an abuse of discretion" and found that "such amounts as were fixed are necessary to assure the presence of the petitioners in the further proceedings in the criminal case and for no other purposes." (Memorandum Opinion, p. 5).

On appeal, the Court of Appeals for the Ninth Circuit on October 3 affirmed Judge Harrison's order. It held that habeas corpus is not a proper remedy for a person held in default of allegedly excessive bail (C.A. opinion, pp. 2-3). The court further stated, however, that, even if it considered habeas corpus a proper remedy, it would affirm the order because it could not say that Judge Harrison erred in holding that the bail fixed was necessary to assure the presence of petitioners in the further proceedings in the criminal case (C.A. opinion, pp. 3-4). Judge Healy, dissenting, thought that habeas corpus is available to one detained in custody who claims the bail fixed is excessive and that petitioners' claim should be considered "unfettered by the holding of the majority" that habeas corpus was not a proper remedy.

Petitioners state (Pet. 15) that they "intend to immediately file an application for writ of certio-

rari with the United States Supreme Court from the determination of the Court of Appeals for the Ninth Circuit affirming the order of the District Court denying the petitions for writs of habeas corpus."

The matter is presently before this Court on petitioners' application for bail submitted to Mr. Justice Douglas,[2] and referred by him to the entire Court.

ARGUMENT

I

The Question of the Power of This Court or a Justice Under This Court's Rule 45 to Grant Bail Pending Review of a Habeas Corpus Proceeding

On March 29, 1886, this Court promulgated its then Rule 34, which, as amended on May 10, 1886, read (117 U.S. 708):

> CUSTODY OF PRISONERS ON HABEAS CORPUS
>
> 1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.
>
> 2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or

[2] An application for habeas corpus was also submitted to Mr. Justice Douglas, but we are advised that this application has not been referred to this Court.

judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

This rule was continued unchanged (see 210 U.S. 499; 222 U.S., p. 37 of rules printed at end of volume) until July 1, 1925, when it was revised to its present form (Rule 42, 266 U.S. 685; now Rule 45, 275 U.S. 629, *supra*, p. 2).

(a) This case comes within the literal language of paragraph 1 of the rule, since no writ of habeas corpus issued, but only an order to show cause, and, after a hearing on the petition and order, the petition was denied. At no time in the proceeding was any order made respecting production or the custody of petitioners. Paragraph 1 provides that "Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed." This provision is not materially different from paragraph 1 of the old Rule 34, *supra*.

Paragraph 1 may be read not only as a limitation on the lower courts and judges,[3] but also as

[3] In *In re Murphy*, 87 Fed. 549 (C.C.D. Mass.), a writ of habeas corpus was denied to one in prison under sentence of a state court, application for the writ having been based upon

a limitation on this Court. The provision of paragraph 4 that the Supreme Court will not disturb an order of the district court respecting custody or enlargement pending review except upon a showing of "special reasons" does not seem to relate to orders under paragraph 1. For that provision of paragraph 4 presupposes an "initial order respecting the custody or enlargement." The quoted phrase would appear to refer back to the situations covered by paragraphs 2 and 3, which relate specifically to orders as to custody or enlargement, and not to the decision on the application for the writ. Under paragraph 1, the District Court, when refusing to issue the writ, is not authorized to enter any order as to custody but must leave the custody undisturbed.

Since, however, the petitions in this case were denied after a hearing on the petitions and orders to show cause, the case may be deemed to come within the intendment of paragraph 2. See 28 U.S.C., Supp. IV, 2243, which provides that a "court, justice or judge entertaining an application

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the alleged unconstitutionality of the statute under which he had been sentenced. The court had grave doubts as to the constitutionality of that statute, and, for that reason, thought that the petitioner ought to be given an opportunity to apply for bail pending appeal. But it apparently did not believe that it possessed power to allow bail where the writ had not issued. To enable him to do so under Rule 34, the court stated that, "on its return, we will order the discharge of the writ, and thereupon consider any application that may be made for admitting to bail, pending an appeal, if one is taken" (87 Fed. at 553).

for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted * * *." The provision for an order to show cause, a procedure approved in *Walker* v. *Johnston*, 312 U.S. 275, 284, serves the same purpose as a writ in calling upon the respondent to justify his detention of the petitioner and in bringing the matter on for hearing in situations where production of the petitioner is unnecessary in the determination of the issues. This procedure is similar to the situation contemplated by paragraph 2 of discharge of a writ and denial of the petition after a hearing. For this reason we shall consider the question whether, assuming the matter to fall within paragraph 2, a single Justice, or only the Court, has power to grant bail pending appeal from an order discharging a writ of habeas corpus after it has been issued.

(b) On July 1, 1925, a very material change was made in paragraph 2. To the provision respecting custody or enlargement pending review of a decision discharging a writ of habeas corpus after it has been issued, there was added the phrase, "as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case." At the same time paragraph 4 was added, which provides that only "this court" will disturb an order of the district court respecting cus-

tody or enlargement pending review upon a showing of special reasons.

It seems clear that by this change in the rule the Court intended to vest power only in the court or judge who rendered the decision to disturb the custody of the prisoner pending review, with the exception that *this Court* can do so "only where special reasons therefor are shown." We do not know why the Court made this change in its rule, but it may have thought that the court or judge who heard the habeas corpus proceedings is in a better position to render a decision with respect to custody of the prisoner pending review than a court of appeals or a single Justice or circuit judge.

In every case in which the rule has been interpreted, it has been given its literal meaning. Thus, the Second Circuit in *United States ex rel. Thomas* v. *Day*, 29 F. 2d 485, held that a circuit judge does not have the power to grant bail to a prisoner pending review of an order discharging a writ of habeas corpus. It said (p. 487):

> * * * By paragraph 42 [now 45] of the Revised Rules of the United States Supreme Court, July 1, 1925 (266 U.S. 685), and rule 30 of this court, adopted October 17, 1925, the custody of a prisoner who has sued out a writ of habeas corpus which has not been sustained may not be disturbed, nor may he be enlarged upon a recognizance assuring his appearance, unless such release be granted by the court

> or judge rendering the decision and who makes the order. A judge of the Circuit Court of Appeals is not granted the authority under the rules, either of the Supreme Court or of this court, to grant bail to an alien pending appeal where his writ of habeas corpus has been discharged.

In *York ex rel. Davidescu* v. *Nicolls*, 159 F. 2d 147, the First Circuit held that a court of appeals has no such power (p. 148):

> It will be noted that by this rule [Rule 45, paragraph 2] discretion to admit to bail pending appeal is vested in "the court or judge rendering the decision" discharging the writ. Neither the circuit court of appeals nor a judge thereof is given independent authority to admit to bail.

See also *United States ex rel. Paetau* v. *Watkins*, 164 F. 2d 457, 460 (C.A. 2); *Klopp* v. *Overlade*, 66 F. Supp. 450, 456 (S.D. Ind.).

In *Matter of Application of Pirinsky for Bail Pending Appeal*, Mr. Justice Jackson held that he had no power, either as a Justice of the Supreme Court or as Circuit Justice, to grant bail pending appeal from an order discharging a writ of habeas corpus after a writ had been issued. 70 S. Ct. 232. Circuit Judge Charles E. Clark had previously held, in the same case, that he had no power to grant bail. Their rulings denying bail were based on the *Davidescu* and *Thomas* cases, *supra*.

On the other hand, in *Carlson et al.* v. *Landon, District Director,* 341 U.S. 918, No. 35 this Term, the Court granted bail pending certiorari proceedings on an application made to Mr. Justice Douglas.

These decisions taken together hold that only the District Court rendering the decision and this Court as a Court have power to grant bail pending appeal from an order discharging the writ of habeas corpus after it has been issued. We think that this is the correct construction of Rule 45.

II

The Question of the Propriety of Habeas Corpus as a Remedy for Attacking Allegedly Excessive Bail

Our analysis of this question convinces us that habeas corpus is a proper mode of attacking bail alleged to be excessive. The Eighth Amendment's proscription against excessive bail is designed to prevent the practical denial of bail by setting it prohibitively high. *United States* v. *Motlow,* 10 F. 2d 657 (C.A. 7, Butler, J.); cf. *United States* v. *Lawrence,* C. C. D.C. 1835, Fed. Cas. No. 15,577. Habeas corpus was used very early to determine the right to bail. *United States* v. *Hamilton,* 3 Dall. 17. The power to assure bail by habeas corpus is the same whether there has been an outright denial or a setting of an excessive sum. Petersdorff, *A Practical Treatise on the Law of Bail in Civil and Criminal Proceedings* (1835), pp. 512-513. Since no appeal lies from an interlocutory order

fixing or denying a motion for reduction of bail (cf. *Cobbledick* v. *United States*, 309 U.S. 323; *Berman* v. *United States*, 302 U.S. 211; *Browder* v. *United States*, 168 F. 2d 418 (C.A. 5)),[4] the accused would be without remedy to vindicate a constitutional right if he were barred from habeas corpus.

The Court of Appeals for the Second Circuit has explicitly held, contrary to the holding of the Ninth Circuit in this case, that a petition for habeas corpus in a district court is a proper way to challenge bail as excessive. *United States ex rel. Rubinstein* v. *Mulcahy*, 155 F. 2d 1002. There, the petitioner was indicted for knowingly making false statements to his local draft board regarding his non-liability for service under the Selective Training and Service Act of 1940. He pleaded not guilty and was released on bail which he furnished in the amount of $20,000. Thereafter, on the government's motion to increase the bail to $1,000,000 on the basis of information it had received indicating a purpose to flee the jurisdiction, the district court raised the bail to $500,000. After the denial of his motion before another judge for a reduction of bail, petitioner surrendered to the United States marshal and filed a petition for a writ of habeas

[4] This has been the holding in states having comparable statutes restricting the right of appeal to final decisions. *People ex rel. Shapiro* v. *Keeper of City Prison*, 290 N. Y. 393, 49 N. E. 2d 498; *Wells* v. *Commonwealth*, 299 Ky. 51, 184 S. W. 2d 223; *Ex parte Bice*, 105 Tex. Cr. 484, 289 S.W. 43.

corpus challenging the validity of his restraint on the ground that the bail was excessive.

The Second Circuit concluded that the remedy of habeas corpus was proper. It also concluded that the bail set was excessive, reversed the District Court's order denying the writ, and remanded the case with directions to grant the writ and fix reasonable bail to insure the relator's appearance in the criminal proceeding, indicating that if no further facts were shown the bail need not be in excess of $50,000. The Second Circuit later followed this holding in *United States ex rel. Turiano* v. *Mulcahy*, 177 F. 2d 1021.

There are few other federal cases on this point.[5] In *Johnson* v. *Hoy*, 227 U.S. 245, and *United States ex rel. Miller* v. *Reing*, 81 F. Supp. 367 (E. D. Pa.), it seems to have been assumed that habeas corpus would be a proper remedy. But there is substantial state court authority that habeas corpus is a proper way to attack excessive bail. The statutory differences in the states are unimportant; reliance is placed by the state courts on common constitutional provisions against requiring excessive bail. See *People ex rel. Sammons* v. *Snow*, 340 Ill. 464, 173 N. E. 8; *People ex rel. Deliz* v. *Warden*, 260 App. Div. (N.Y.) 155; *Evans* v. *Foster*, 1 N.H. 374,

[5] Comparison may be made of cases involving the administrative setting of excessive bail in deportation proceedings. It has been held that this was subject to attack on habeas corpus. *United States ex rel. Pirinsky* v. *Shaughnessy*, 177 F. 2d 708 (C. A. 2); *Colyer* v. *Skeffington*, 265 Fed. 17 (D. Mass.), reversed on other grounds, *Skeffington* v. *Katzeff*, 277 Fed. 129 (C. A 1).

378; *In re Stegman*, 112 N.J. Eq. 72; *Ex parte Hayworth*, 34 Okla. Cr. 41, 244 Pac. 827; *Ex parte Bice*, 105 Tex. Cr. 484, 289 S.W. 43; 1 Bailey, *A Treatise on the Law of Habeas Corpus and Special Remedies* (1913), p. 488.

In several district court decisions the issue of excessive bail has been raised on motions for reduction of bail. See *United States* v. *Averett*, 26 F. 2d 676 (W.D. Va.), *Smith* v. *Lee*, 13 Fed. 28 (N.D. N.Y.); *United States* v. *Brawner*, 7 Fed. 86 (W.D. Tenn.). Such a motion is an appropriate way to raise in a trial court in the first instance a wide variety of objections to the amount set as bail, many of which lie solely within the discretion of the district judge. It has been said, and properly so (cf. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269; *Sunal* v. *Large*, 332 U.S. 174), that the remedy of a motion for reduction of bail should be exhausted before recourse can be had to habeas corpus. See *Smith* v. *Henson*, 298 Ky. 182, 182 S.W. 2d 666. This prerequisite has been satisfied here. Bail for 10 of the 12 petitioners had originally been fixed by Judge Carter on August 8, 1951. After Judge Carter's disqualification, Judge Mathes entertained a renewal of the motion to fix or reduce bail on behalf of the 10 petitioners and a motion in the first instance on behalf of the remaining two.

Unlike a motion for reduction of bail, habeas corpus is not an appeal to the discretion of the

court. Relief depends upon a finding that the bail fixed is so excessive as to amount to a deprivation of constitutional right. Thus, in *Ex parte Hayworth*, 34 Okla. Cr. 41, 244 Pac. 827, the applicable provision was a section of the Oklahoma Bill of Rights which provided that "Excessive bail shall not be required." In approving the use of habeas corpus the court said (at p. 43):

> In an application to this court for habeas corpus, for a reduction of bail on the ground that the amount fixed by the trial court is excessive, it is not sufficient that this court might originally have deemed a lesser amount sufficient. It must clearly appear that the trial court has abused its discretion to an extent that denies the defendant his constitutional rights, before this court will reduce the amount of bail as fixed by the trial court; as the Constitution is supreme, and as the rights which it guarantees to the people were intended to be and should be upheld.

III

The Considerations Which Control the Determination of the Amount of Bail Justify the Bail Fixed for the Petitioners

A. The Eighth Amendment provides that, "Excessive bail shall not be required," thus embodying in Federal law the principal of the English Bill of Rights of 1689, "That excessive baile ought not to be required." Neither in England nor in any American jurisdiction has bail been regarded as

an absolute right to be fixed solely in relation to the financial means of an accused. As stated by Mr. Justice Story in *Ex parte Milburn*, 9 Pet. 704, 710:

> * * * bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offence, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment which the law ordains for his offence.

Rule 46(c) of the Federal Rules of Criminal Procedure reflects this fundamental purpose. It provides that:

> (c) AMOUNT. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.

It is significant that the dominant clause of Rule 46(c) is that, "the amount [of bail] shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant."

Rule 46(c) also provides that in determining the amount of bail consideration shall be given to "the

nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.". From this portion of the Rule the applicants argue that in their case none of these factors warrant bail of $50,000, pointing out (1) that the maximum penalty may be imposed under the charge is five years' imprisonment and a fine of $10,000, (2) that other defendants charged with crimes carrying similar penalties have usually been enlarged on lesser bail, (3) that the applicants are not wealthy, and (4) that they do not have criminal records (Applicants' Memo. of Law, pp. 10-17).

The applicants' analysis oversimplifies the flexible factors which courts have always considered in fixing bail in an amount reasonably calculated to insure the appearance of an accused for trial and punishment. Thus, it is well established that bail is not made excessive merely by the inability of the accused to procure it. *People ex rel. Sammons* v. *Snow*, 340 Ill. 464, 173 N. E. 8 (1930); *Ex parte Malley*, 50 Nev. 248, 256 Pac. 512 (1927); *Ex parte Duncan*, 54 Cal. 75 (1879); *Re Scott*, 38 Neb. 502 56 N. W. 1009 (1893). Were the rule otherwise, as pointed out in *Re Scott, supra*, an accused "without means or friends would be entitled to be discharged on his own recognizance".

In *In re Robinson*, 23 L.J.Q. B.N.S. 286, 287 (1854), Justice Coleridge declared that, "The test,

in my opinion, of whether a party ought to be bailed is, whether it is probable the party will appear to take his trial." This principle was applied to circumstances greatly resembling the instant case in *Regina* v. *Butler*, 14 Cox C.C. 530 (1881). In that case, the accused, who were seeking bail pending trial, were members of a large organization which was forcefully opposing the administration of land laws. Bail was denied altogether on the ground that, "Where the offence charged has appeared to be the result of a widespread organization or conspiracy and it appears probable that if the securities given should be forfeited, the bail would be indemnified out of funds subscribed by the body of which the traversers are members, the Court has regarded security by bail unreliable, and therefore refused to admit the traversers to bail."

We do not suggest that under Rule 46 the applicants may be denied bail. However, American court have also given great weight to the likelihood of bail-jumping in fixing the amount of bail. Thus, in *Ex parte Ruef*, 7 Cal. App. 750, 753, 96 Pac. 24 (1908), high bail pending trial was upheld in view of the seriousness of the charge (bribery of public officers) and because "the greater the amount of his wealth the more readily he could give a large bail, and the more readily he could flee to some country where perhaps he could live in comfort on his possessions."

More recently, the New York Court of Appeals has emphasized the likelihood of flight as a factor

determining the amount of bail. In *People ex rel. Shapiro* v. *Keeper of City Prison*, 290 N.Y. 393, 49 N.E. 2d 498 (1943), the Court of Appeals approved the fixing of bail of $100,000 after indictment and pending trial for an accused charged with extortion, who had a criminal record, and who had once forfeited bail after an earlier conviction. The Court of Appeals noted (at p. 398) that:

> * * * As a matter of logic it might seem that a prohibition against excessive bail should imply a right to bail in appropriate amount in all cases, but the history of the law of bail negatives such an implication. At common law the courts had discretion in all cases after indictment, to grant or deny the application, although they ordinarily did grant it in all except capital cases.

In *People ex rel. Lobell* v. *McDonnell*, 296 N.Y. 109, 71 N. E. 2d 423 (1947), bail of $100,000 was approved for one indicted for thefts and forgeries totalling $780,000, where the sole evidence of likelihood of flight was a previous indictment for jumping bail. In *People ex rel. Rao, et al.* v. *Adams*, 296 N.Y. 231, 234, 72 N. E. 2d 170 (1947), the Court of Appeals upheld bail of $250,000 fixed for each of two material witnesses in a homicide investigation, on the ground that:

> In view of the facts here presented—for instance, the seriousness of the crime under investigation, murder; the character, reputation, background and extensive criminal records of

> relators; their relationship to others against whom they may be called to testify; the possibility of flight to avoid giving testimony; the difficulty, if not impossibility, of procuring their return if they do leave the State—in view, we say, of those facts among others, there was sufficient before the Judge of the Court of General Sessions to permit him, in the exercise of discretion, to fix the ~~bail~~ at $250,000 (Code Crim Pro. § 618b). While it is urged that such amount is high, it may not properly be said—on the record before us—that it was excessive as matter of law. * * *

The cases cited above simply confirm the obvious meaning of Rule 46(c), that the sole function of bail is to insure the appearance of the accused. While even a genuine likelihood of flight will not justify a total denial of bail, it must weigh heavily in determining what amount of bail will reasonably insure appearance. It follows that the financial resources of a particular defendant cannot require that bail be set in an amount insufficient to insure his appearance for trial and sentencing. An inevitable consequence of these considerations, indeed of the very purpose of bail, is that persons charged with crime are often deprived of liberty pending trial because of their inability to procure bail sufficient in amount to insure their appearance. Moreover, bail is not fixed solely in relation to the penalty which might be imposed after trial. The purpose of bail is to insure appearance, rather than

to enrich the Treasury, and likelihood that the accused may jump bail must weight more heavily in fixing the amount of bail than does his alleged inability to procure bail, the nature of the offense, or the punishment which may be imposed upon him for the substantive offense charged.

B. Applying these principles to the instant case, in the light of notorious facts, it is clear that the bail of $50,000 fixed for each of the petitioners is not an unreasonable judgment as to the amount which "will insure the presence of the defendant", within the meaning of Rule 46(c), and thus is not excessive bail within the meaning of the Eighth Amendment. It is significant in this connection that bail for some or all of the applicants has been fixed by four district judges (Goodman, Carter, Dimock, Mathes) in amounts of $50,000 or more, and that another District Judge (Harrison) and two circuit judges (Mathews and Bone) found that $50,000 bail was not excessive. Moreover, the grand jury which returned the indictment recommended bail of $100,000 for Schneiderman and $75,000 for the others. Only if it can be said that all of these seven judges were so flagrantly abusing their discretion as to violate the constitutional requirement would this Court be warranted in overturning the decision below.

The petitioners are charged with having participated in a conspiracy to advocate, and to organize the Communist Party of the United States to

advocate, the overthrow of the Government of the United States by force and violence. Congress has found that such a conspiracy exists, that it is international in scope, and that the "direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country" (Internal Security Act of 1950, Sec. 2(4)). It has been judicially determined that such a conspiracy exists. *Dennis* v. *United States*, 341 U.S. 494. Although it has not yet been proved that these petitioners are participants in that conspiracy, "the nature and circumstances of the offense charged" is one of the factors which Rule 46(c) requires to be considered in fixing bail in an amount sufficient to insure the presence of the defendant. Of particular significance is the fact that each of the petitioners is charged with acting as a leader in the same conspiracy which was found to exist in *Dennis* v. *United States, supra.*

Thus, the Department is informed that petitioner Stack has been active in the Communist Party for many years. In 1945 she was elected State organizational Secretary of the Communist Party of California. That year she was also elected as a member of the State Board of the Party, holding this position until 1948. Since then she has continued to be a very active member of the Party in San Francisco.

Petitioner Richmond, who was born in England of Russian-born parents, is Executive Editor of the

"Daily People's World," West Coast Communist newspaper. He has been associated with the "Daily Worker" and the "Daily People's World" since 1934, during which time he has, as a newspaperman and writer, actively supported the aims and purposes of the Communist Party.

Petitioner Connelly, who has been active in Communist Party work since 1938, is Los Angeles Editor of the "Daily People's World." In 1946, he was convicted on a charge of advocating violence, in connection with a strike, resulting in a riot, and sentenced to 60 days' imprisonment.

Petitioner Healey, Connelly's wife, has been engaged in Communist activities since 1928 and has been a full-time employee of the Communist Party since 1945. She is now chairman of the Los Angeles Communist Party and has also held the position of Organizational Secretary of the Los Angeles County Communist Party.

Petitioner Fox, an alien born in Germany, is water front section organizer of the San Francisco County Communist Party. He has held important positions in the Communist Party since 1936, including Educational Director, Dues Director, Branch Director, and head of the Trade Union Section of the Communist Party Northwest District.

Petitioner Schneiderman, the petitioner in *Schneiderman* v. *United States*, 320 U.S. 118, is Chairman of the California State Committee of the

Communist Party and a member of the Party's Alternate National Committee. This committee was formed by the Party to act in the absence of the 11 Communist leaders convicted in *Dennis, et al.* v. *United States*, 341 U.S. 494. After their conviction, Schneiderman went to New York where he was acting as a top executive in the national headquarters of the Party at the time of his arrest. He has been active in the Communist Party and has held important Party positions since 1927. In the middle 1930's he spent 18 months in the Soviet Union during which he attended the Seventh World Congress of the Communist International in July 1935.

Petitioner Lambert, who has long been engaged in Communist Party work, is Chairman of the Security Review Commission, District 13, Communist Party, U.S.A. As such, he is the Party's chief disciplinarian. He has held important positions in the Party since 1932, including Party organizer, Los Angeles Trade Union Director, and vice-president of the San Francisco Communist Party.

Petitioner Steinberg, who has been a member of the Communist Party since 1937, is Legislative Director of the Los Angeles County Communist Party. He was a delegate to the State Convention of the Communist Party and a member of the Central Committee of the Party during 1940. He has also been Party organizer of the Nineteenth California Congressional District and has three times run for public office on the Communist Party ticket.

Petitioner Yates, who has been a member of the Communist Party since 1933, is now State Secretary of the Communist Party of California. As such she helps determine Party policy and is responsible for the operations of the Party in California. She is also both Executive Secretary and Chairman of the Communist Party of San Francisco. Since 1934, Mrs. Yates has held other important positions in the Party, including Party organizer, Organizational Secretary for the Communist Party of San Francisco, San Francisco County Educational Director, State Election Campaign Manager, and County Secretary of the Party. She has three times been a candidate for public office on the Communist Party ticket.

Petitioner Kusnitz, who was born in Russia, has been engaged in Communist Party activities since 1929. She visited Russia in 1934. She has held many important positions in the Communist Party, including Educational Director of the Communist Party Training School, and Party Organizer. She is now Executive Secretary of the Los Angeles Committee for the Protection of Foreign Born.

Petitioner Doyle, who has been engaged in Communist Party activities since 1939, is Organizer for the Mission Section of the Communist Party, San Francisco. Since 1940 she has held important positions in the Party, including County Organizer and Secretary, member of California state committee, delegate to National Party Convention and

County Chairman. She has been a candidate for public office on the Communist Party ticket.

Petitioner Lima, who has been engaged in Communist Party activities since 1937, is East Bay Regional Chairman of the Communist Party at San Francisco. In 1940 he was a candidate for Congress on the Communist Party ticket.

The district court, therefore, could reasonably conclude that persons charged with the leadership of a highly organized and strictly disciplined conspiracy to bring about the violent overthrow of the Government would not only have little respect for the obligations of bail, but could command the means of flight. This is not mere speculation. Extraordinarily effective channels of escape are available to those charged with Communist activities, and experience has demonstrated that those so charged will and can use those channels. Efforts by the Government to apprehend them have proved almost futile. Gerhart Eisler, a Communist, fled the jurisdiction of the United States to escape punishment. *Eisler* v. *United States*, 338 U.S. 189. He forfeited bail in three proceedings, totalling $23,500. Four (Thompson, Winston, Green, Hall) of those convicted in *Dennis* v. *United States*, 341 U.S. 494, of the same conspiracy with which the applicants are charged, while enlarged on $20,000 bail each, a total of $80,000, failed to appear and surrender to serve their sentences. (Return to writ of habeas corpus, p. 4.) Only one of them,

Gus Hall, who was apprehended on October 8, 1951 in Mexico, has been found. Also, four of those subsequently indicted in New York and charged with the same conspiracy (*United States* v. *Flynn, et al.*)—James E. Jackson, Sidney Stein, Fred Fine and William Marron—have never surrendered nor been apprehended.

In the recent trial of *United States* v. *Rosenberg, et al.*, in the Southern District of New York, involving atomic espionage, David Greenglass, a co-defendant who pleaded guilty and testified for the Government, said that he had been instructed by Rosenberg to leave the United States and go to Mexico and then to Stockholm where he would be taken care of by the Soviet Union. Morton Sobell, another defendant convicted in the *Rosenberg* case, who had been engaged in Soviet espionage activities in New York, fled to Mexico shortly after the arrest of Greenglass. He was arrested by the Federal Bureau of Investigation at Laredo, Texas, upon his deportation from Mexico.

These facts were considered by Judge Harrison in denying the applicants' petitions for habeas corpus; he said, "The offenses charged are very serious and the court realizes as a matter of common knowledge that those charged with similar and related offenses the forfeitures have been above average and apprehension after forfeiture has been nil" (Memo. opinion, p. 5). In view of these past experiences, as Judge Harrison held,

how can one "say that all who have exercised their discretion are wrong" and that $50,000 bail is unnecessary "to insure the presence of the accused" (Memo. opinion, p. 4).

From the petitioners' own statements, it appears that they can put up only nominal bail from their personal resources. Since, by any standard, far more than nominal bail should be required here, they must procure bail from other sources. Accordingly, bail will be meaningless unless fixed in an amount which will give the sureties, i.e., the substitute jailors, a strong incentive to see to it that the applicants do not jump bail. Here, as in *Regina* v. *Butler, supra*, the applicants are alleged to be members of a large organization which could so readily raise smaller amounts of bail that there would be little assurance against bail jumping. Also, these applicants, while not themselves former bail jumpers, are alleged to be members of an organization the members of which have already demonstrated that much more than $20,000 bail is insufficient to insure their appearance. These circumstances, taken together, indicate a likelihood of flight by the applicants unless their appearance is secured by bail in such an amount that its forfeiture would be a serious financial loss, not merely when measured by the applicants' personal resources but also to whatever persons or organizations may put up bail. To fix bail in an amount measured solely by the personal resources of these

applicants would ignore the obvious fact that such bail will be no deterrent to their jumping bail if and when they are instructed to do so by agents of the Communist organization, which will then attempt to provide them with funds, travel documents, and refuge abroad.

CONCLUSION

The application should be denied.

Respectfully submitted.

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OCTOBER 1951.

In the Supreme Court of the United States

OCTOBER TERM, 1951

LORETTA STARVUS STACK, AL. RICHMOND, PHILIP MARSHALL CONNELLY, DOROTHY ROSENBLUM HEALEY, ERNEST OTTO FOX, WILLIAM SCHNEIDERMAN, CARL RUDE LAMBERT, HENRY STEINBERG, OLETA O'CONNOR YATES, ROSE CHERNIN KUSNITZ, MARY BERNADETTE DOYLE AND ALBERT JASON LIMA, PETITIONERS

v.

JAMES J. BOYLE, UNITED STATES MARSHAL, RESPONDENT

ON PETITION FOR BAIL PENDING APPLICATION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

During the course of the argument Mr. Justice Frankfurther requested the Government to inquire further into whether an appeal from an order denying a motion to reduce bail should not be regarded as the proper method of obtaining appellate

review in bail matters. Such a procedure, if available, it was suggested, would make resort to habeas corpus unnecessary and accordingly inappropriate, and thereby avoid the problems as to the interpretation of Rule 45 which have arisen in this and other cases.

In the brief filed on the day of the argument and at the argument, Government counsel stated that in their opinion orders fixing or denying a reduction of bail were not appealable. This conclusion was not based on any consideration as to which method of review would be preferable as a matter of policy. It may well be that a direct appeal to a court of appeals from such an order would provide a more orderly means of securing appellate review than requiring the filing of a petition for a writ of habeas corpus as a separate proceeding in the district court and appealing from the decision in the habeas corpus case. Our conclusion was based upon an examination of the relevant legal materials which led us to believe—despite the absence of any decision of this Court on the exact question—that as a matter of law it could not be said that an appeal from an order fixing or refusing to reduce bail was available.

The factors which caused us to reach this conclusion were the following:

1. Whether or not an order on a motion to reduce bail is appealable to a court of appeals depends on whether that order is a "final decision" within the

meaning of 28 U.S.C., Supp. IV, 1291. *Berman* v. *United States*, 302 U.S. 211, 212, states that "Final judgment in a criminal case means sentence." Cf. *Korematsu* v. *United States*, 319 U.S. 432, 434. And *Cobbledick* v. *United States*, 309 U.S. 323, emphasizes the importance of avoiding a piecemeal disposition on appeal of the basic single controversy in a criminal case "where the result of review will be 'to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation'" (p. 326). Neither of these cases, of course, was dealing with the present problem. But the order in *Cobbledick* denying a motion to quash a subpoena *duces tecum* addressed to a *witness* before a grand jury would seem to be at least as separable from the principal criminal proceeding as an order on an application for reduced bail.[6]

More recently, in *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541, 545-547, the Court held that an order determining the right to security in a civil case was separately appealable, saying (p. 546):

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied

[6] The *Cobbledick* case is distinguishable in that an appeal from a bail order would not necessarily interrupt the progress of the main case and in that the witness apparently may test the validity of a subpoena in a contempt proceeding.

review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569; *United States* v. *River Rouge Co.*, 269 U.S. 411, 414; *Cobbledick* v. *United States*, 309 U.S. 323, 328.

The *Cohen* opinion then continues (p. 547):

> But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear *and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time,* appealability would present a different question. [Italics supplied.]

The last sentence quoted would appear to cover cases involving the *amount* of bail, inasmuch as the trial court has power to increase or decrease the amount of bail from time to time whenever the circumstances so require. *E.g., United States ex rel. Rubinstein* v. *Mulcahy*, 155 F. 2d 1002 (C.A. 2); Rule 32 (a), F.R. Crim. P.; 18 U.S.C., Supp. IV, 3143.

Although the *Cohen* case leaves open the question as to the appealability of a decision with respect to the amount of security, the last sentence quoted seems to imply that such orders would not be ap-

pealable. We must concede, however, that the cases in this Court dealing with analogous problems cannot be said to be dispositive of the question here in issue. We, therefore, turn to other considerations.

2. It is, of course, true that a decision fixing bail or refusing to reduce bail, has the effect of determining a person's rights and status for the period *pendente lite*. But this does not in itself make the order a "final decision" within the meaning of Section 1291. The same is clearly true of orders granting or denying interlocutory injunctions, which are the equivalent of bail on the civil side inasmuch as they may have the effect of granting the final relief sought by the complainant during the pendency of the proceeding. And yet it seems to have been assumed that unless specific provision were made in the statute permitting appeals from interlocutory injunctions and other types of interlocutory orders, they would not be appealable. For that reason, Section 1292 lists the types of interlocutory orders from which appeals are authorized. Orders as to bail were not included.

3. In so far as we have been able to ascertain, in the time available for research, there has not been a single reported case in the federal courts in 162 years in which an appeal has been taken from an order fixing or refusing to reduce bail before conviction—or indeed any case in which

the problem as to the appealability of such an order has ever been discussed. Since, undoubtedly, many persons have been dissatisfied with bail orders in that period, the failure of their counsel ever to try to appeal from such orders manifests a general understanding on the part of the bar that such an appeal does not lie. This conclusion is reinforced by the fact that in a number of states having comparable statutory systems, direct appeals from bail orders have not been allowed. See footnote 4, page 10, main brief, and *Miller* v. *State*, 43 Tex. 579 (1875).

4. In contrast, the federal courts, prior to this case, and a number of state courts, have held that a claim that bail was excessive may be raised on habeas corpus and then appealed. See cases cited in our main brief, pp. 10-12, and *Ex parte Ryan*, 44 Cal. 555 (1872). It is true that there have not been very many such cases in the federal courts. But what cases there are—up to this one—all go in the same direction, as do the state decisions and secondary authorities which purport to summarize the general law on the point. 39 C.J.S. 538[7]; 25 Am. Jur. 210[8]; Church, *Habeas Corpus* (2d ed. 1893), 632-633.

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[7] "Where a prisoner is held under excessive bail, the imprisonment is illegal, and habeas corpus lies to obtain a discharge on bail in a proper amount."

[8] "It is a general rule that habeas corpus lies to procure the discharge upon bail in a proper amount of one who is held under excessive bail, provided, in some jurisdictions, that application has been first made to the lower court for reduction of the amount of bail."

It was suggested at the argument that such cases as *Rubinstein* are not of significance since they do not specifically say that a remedy by appeal from an order refusing to reduce bail is not available. But if it had been thought that a simple remedy by direct appeal had been open, habeas corpus would not have been an appropriate remedy, and it cannot be assumed that the Second Circuit or the other courts which have come to a similar conclusion would have overlooked such an obvious principle. The unspoken premise of these decisions seems to be that the matter cannot be resolved by direct appeal.[9]

5. The lower court case most closely in point is *Browder* v. *United States*, 168 F. 2d 418 (C.A. 5), which held unappealable an order *revoking* bail. This would seem sufficiently close to an order refusing to reduce bail to be substantially indistinguishable. If anything, an order revoking bail entirely would seem to be of greater finality.

United States v. *Motlow*, 10 F. 2d 657 (Butler, J., C.A. 7), was concerned with bail *after* conviction and pending appeal.[10] This is governed by different Rules, which specifically allow an appellate court or judge or a circuit justice to fix bail in such circumstances—on motion or application, not by

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[9] The general statement in 39 C. J. S. 538, that habeas corpus lies when a prisoner is held under excessive bail is qualified by "the rule that the writ may be denied where there is another adequate remedy."

[10] *Hewitt* v. *United States*, 110 F. 2d 1, 6 (C. A. 8), and cases cited are distinguishable for the same reasons.

appeal—and accordingly has no application here. See Rules of Crim. Proc. 39(a), 46(a)(2).

We would agree that if a direct appeal from a refusal to reduce bail were allowable, habeas corpus would be an inappropriate remedy except conceivably in very unusual circumstances. The foregoing considerations, however, have led us to the conclusion that the order as to bail is not directly reviewable.

Respectfully submitted.

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